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IN THE

Supreme Court of the United States

October Term 1952

No. 368

THE DE LA RAMA STEAMSHIP COMPANY, INC.,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

On writ of certiorari to the United States Court of Appeals for the Second Circuit.

REPLY BRIEF FOR PETITIONER

In this discussion, we shall for clarity and brevity refer to Revised Statutes, Section 13, as amended (58 Stat. 118, now 1 U. S. C. 109), as the "saving statute". We shall call the Joint Resolution of July 25, 1947, the "repealing act"; and we shall refer to the War Risk Insurance Act of June 29, 1940, as amended (46 U. S. C., 1946 Ed., 1128-1128h), as the "repealed statute".

References to the record in this Court will be indicated by the letter "R", followed by a page number.

The General Saving Statute

As we read it, the saving statute is plainly an effort by Congress to remedy the harsh and unfair common law rule concerning the effect of repeal of statutes creating liability.

It is a rule of construction of general application. In itself it contains no evidence that Congress was interested in or concerned with technical legal notions, such as the substance-procedure dichotomy. So long as the repealed statute created a "liability," that statute under the saving statute was to be "treated" as still remaining in force as a whole for the purpose of sustaining any proper action or prosecution for the enforcement of such "liability." This was merely fair play. Nothing was said by Congress and nothing can be implied to justify dissecting the repealed statute, applying the remedial saving statute to "substantive" sections, and denying its application to "procedural" sections. Nothing was said by Congress and nothing can reasonably be implied to justify the suggestion now made that perhaps the saving statute applies to save liabilities incurred in favor of the government, but not to save liabilities against the government. It was and is within the power of the Congress to use in the repealing act words appropriate to destroy or change both the liability and the remedy (or either of them) from the date of repeal, even so far as pending actions were concerned.* Indeed, it was equally within the power of the Congress to repeal the saving statute altogether and revert to the common law rule. Congress did nothing like this.

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*The repealing act in this case merely expunges the War Risk Insurance Act in its entirety. *Hallowell* and *Bruner* presented no such situation. Congress destroyed the jurisdiction of the tribunal involved, and did nothing else. Therefore, the general saving statute had no application at all. In *Great Northern* the Hepburn Act provided remedies different from those found in the Elkins Act, and as to pending actions, at least, preserved by a specific saving clause the remedies formerly given by the Elkins Act. But had *Great Northern* involved a situation, such as is found here, under which the Elkins Act was simply removed from the statute books, there is in our mind not the slightest doubt that the general saving statute would have applied fully to preserve both the liability and the remedy for its enforcement.

It seems to us also that to cite *Hallowell* and *Bruner* in support of the judgment under review is completely to misapprehend the purpose and scope of the saving statute, as well as the *rationale* of those cases. Neither in *Hallowell* nor *Bruner* was there any reason to discuss the saving statute. The repealed statutes created no liability. Therefore, the saving statute was clearly without application—one could never hurdle the barrier of the requirement that to make the saving statute applicable, the repealed act must have created a liability. In *Hallowell* and *Bruner* Congress, expressing a change in public policy, used a technique familiar since the days of *Ex Parte McCardle*, 7 Wall. 506. It swept out of existence the jurisdiction of a tribunal over a particular field, just as one might close off one wing of a building. The Joint Resolution of July 25, 1947, has not the faintest resemblance to the repealing statutes under review in *Hallowell* and *Bruner*. In those cases, as we have said, the saving statute was completely irrelevant.

To support the judgment below on the ground assigned by the Court of Appeals, one must conclude:

(1) That the saving statute does not mean what it plainly says—that what seems to be a generous and wholesome mitigation of a harsh common law rule must really be stripped of its effect by treating the repealed statute as a series of statutes, and by examining each one of this supposed series, making a distinction between substance and procedure, giving effect to the saving statute so far as substance is concerned, but denying that it applies to procedure or remedy. We say that on its face such a technique frustrates the intention of Congress, expressed when it enacted and recently confirmed when it expanded the saving statute by extending its coverage to expired statutes.

(2) Or, one must conclude, although the court below did not mention the possibility, that *perhaps* (as now suggested very faintly in the government's brief, p. 11) the

saving statute may not save "liability" incurred by the government under a repealed statute.*

But this suggestion is negated by *Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 689, where the government was held subject to *liability in personam "like a private owner for damages for failure to protect vessels against the wreck under the* [*Wreck*] *Act of 1899."* (italics ours), which Act not only created *liability* but also contained provision for criminal *penalties* in event of violations by private shipowners.

Moreover, the implication by this Court is clear in *Bruner,* 340 U. S. 112, 117, that if the repeal there nad "altered the nature or validity of * * * the Government's *liability*" (emphasis ours), the "general savings statute" would have been applicable.

Certainly since *Nardone* v. *U. S.* [1939], 302 U. S. 379, it has been firmly established that the sovereign intends its statutes to apply to itself where there are no specific words to the contrary, unless (1) the statute in question would, if so interpreted, take away some peculiar attribute of sovereignty, or (2) would, if so interpreted, produce an absurd result. It is clear to us, at least, that the saving statute here involved falls within neither category. That the government shall be liable, like any insurance company

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* The government is "clear" (Brief, p. 11, fn. 8), that the saving statute is applicable to actions *by* the United States against a private party. But we say that contrary to the government's intimation (Brief, p. 10) application of the saving statute to liabilities *of* the government does not in any sense divest the sovereign of "pre-existing rights and privileges." As pointed out *supra* (p. 2), the saving statute is purely a rule of construction, and Congress is always free, as we have said before, by the use of appropriate language in the repealing act to destroy or alter both the liability and remedy (or either) created by the repealed statute (*Hertz* v. *Woodman,* 218 U. S. 205, 217). Indeed, Congress can at any time repeal the saving statute itself.

on its own insurance policies calculated to aid the war effort, was the principle and the policy embodied in the repealed act. By enacting a successor statute the Congress has reaffirmed that principle and that policy. The principle and policy of the repealed act was that the government's liability should be established in the admiralty courts and nowhere else. That is the principle and policy of the statute which supplanted the repealed act. So that, in point of fact, to ignore the saving statute here is again to frustrate a policy adopted and carried out by Congress, not only as to the enforcement of the liability, but also as to the forum in which it is to be enforced.

The Suits in Admiralty Act

The government, in its brief, has very confidently asserted that even in the unlikely event that jurisdiction in the District Court is not preserved by the saving statute, still jurisdiction can be upheld under the Suits in Admiralty Act (46 U. S. C. 741, *et seq.*). It is true that in our libel we invoked jurisdiction under the Suits in Admiralty Act, as well as under the subsequently repealed War Risk Insurance Act (46 U. S. C. 1128-1128h).* Judge Weinfeld at district saw no need to consider the possible applicability of the Suits in Admiralty Act, and we then felt, and still feel, that jurisdiction under the saving statute is so clear that it is unnecessary and possibly confusing to speculate upon Suits in Admiralty Act jurisdiction.

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* The government here says mistakenly (Brief, p. 8) that petitioner in its libel " * * * invoked jurisdiction *solely* under Section 225 of the W. R. I. A. * * * " (italics ours). The fact is that petitioner invoked both the War Risk Insurance Act and the Suits in Admiralty Act (R. 1). Examination of the libel (R. 1-7) will show (R. 5, Art. Tenth) that care was taken to set forth all of the necessary jurisdictional allegations under the Suits in Admiralty Act.

Nevertheless, there was a charter. It contained a clause for insurance. The insurance binder was issued. Clearly both the charter and the binder were maritime contracts. Operation of a merchant vessel for the United States was involved. Under any fair interpretation of the Suits in Admiralty Act a district judge might well feel that the charter and the insurance binder were so intertwined, both relating to the operation of such a merchant vessel, that he could confidently proceed under the Suits in Admiralty Act to adjudicate *all* the questions involved. We still feel that way. And certainly the *Matson* case suggests and supports this approach to the jurisdictional question.

Conclusion

The libel in this case was filed on December 22, 1944. The Joint Resolution repealing the War Risk Insurance Act (among a great many others) was passed on July 25, 1947. There was a reference to a commissioner on the question of damages in October, 1948; hearings on that reference ended in November, 1949. The commissioner's report was confirmed on August 4, 1950, and the case was reached for trial in regular order on March 6, 1951. It was then for the first time that the government made any contention that the Court had in 1947 been shorn of its jurisdiction. And in fact *after* the trial of this case a precisely similar case (*The Alaskan,* 85 F. Supp. 815, supplemental decision, 92 F. Supp. 785; affirmed 191 F. 2d 26; certiorari denied, 342 U. S. 941) was argued in the Court of Appeals, Second Circuit, and the government made no contention, either at circuit or in the *certiorari* petition, that the repealing act had destroyed jurisdiction under the War Risk Insurance Act.

The government is unable to find anywhere in the background of the statute repealed, or the general Congressional policy toward war risk insurance, evidence of any

intention on the part of Congress to transfer this type of litigation to the Court of Claims. Moreover, in all probability such a transfer would produce a serious controversy over petitioner's right to interest, as has been pointed out in our main brief. The government says in a footnote (Brief, p. 16):

> "Preservation of jurisdiction in the District Courts is not, therefore, *essential* to enforcement of the preserved substantive rights."

But we say it is. We believe that interest, in cases like ours, is part of the "just compensation" to which by law petitioner is entitled. It can hardly be said that a liability is "preserved" when in fact it is whittled down.

Perhaps problems of statutory construction are not invariably to be resolved in the light of the justice or the injustice of one solution over against another. But surely a solution which produces injustice is not to be accepted where a plain and logical and proper alternative exists.

Respectfully submitted,

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